

³ The record contains additional evidence received after OWCP issued its May 6, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 25, 2003 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2) for injuries to her left shoulder, elbow, and hand due to factors of her federal employment. She identified April 24, 2003 as the date she first realized that her left upper extremity conditions were caused or aggravated by her employment.⁴ OWCP accepted appellant's claim for bilateral shoulder impingement syndrome, bilateral carpal tunnel syndrome, and bilateral medial and lateral epicondylitis.⁵ It also authorized left and right shoulder surgery, which she underwent on October 31, 2003 and January 30, 2004, respectively. Effective April 12, 2004, appellant returned to work in a full-time, limited-duty capacity as a modified city carrier. Her wage-loss compensation was paid through April 10, 2004.

On March 31, 2009 appellant lost additional time from work because the employing establishment was unable to accommodate her work restrictions. OWCP paid wage-loss compensation for temporary total disability and placed appellant on the periodic compensation rolls effective July 5, 2009. Appellant's wage-loss compensation stopped when appellant returned to work on November 27, 2009.

Appellant worked for only a few days and filed new claims for wage-loss compensation (Form CA-7) for various periods, including December 5 to 18, 2009 and from December 19, 2009 to January 1, 2010. In a decision dated May 3, 2010, her wage-loss compensation claim was denied. On May 8, 2010 appellant filed a request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on October 25, 2010. On January 11, 2011 the hearing representative determined that appellant had met her burden of proof to establish a recurrence of disability for the period December 5, 2009 through January 1, 2010 because there was no work available within her work restrictions, but also found that OWCP should refer appellant to a second opinion examination to obtain a rationalized opinion on whether she could perform the full duties of the position she held when injured, and if not, to obtain work restrictions.

Upon remand on January 28, 2011 OWCP notified appellant that a medical appointment had been scheduled for the purpose of obtaining an independent assessment of her work-related condition and need for restrictions. In a February 23, 2011 report, Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon and OWCP referral physician, provided examination findings and

⁴ Under OWCP File No. xxxxxx118, OWCP had previously accepted bilateral carpal tunnel syndrome and Guyon's tunnel syndrome, finding these conditions arose on or about May 1, 1997. It authorized bilateral surgical releases which were performed on March 27 and June 26, 1998. On January 25, 2000 OWCP granted appellant a schedule award for 10 percent permanent impairment of both the left and right arms, totaling 62.4 weeks' compensation.

⁵ Appellant received an additional schedule award totaling 19 percent permanent impairment of each upper extremity.

work restrictions. He opined that appellant was capable of performing the duties of a modified city letter carrier (sales and services associate) with restrictions of reaching above the shoulder for no more than one hour, no pushing, pulling, and lifting over 25 pounds for more than one hour, and no repetitive movements of the wrists for more than six hours.

On March 17, 2011 Dr. Alexander Raskin, a Board-certified orthopedic surgeon, also allowed appellant to return to limited-duty work with restrictions of no work above shoulder level, no heavy lifting, and no pushing, pulling, or repetitive forceful gripping.⁶

The employing establishment advised OWCP that appellant had returned to full-time, modified duty effective May 31, 2011. Accordingly, OWCP terminated her wage-loss compensation, which had commenced on December 5, 2009, effective May 31, 2011.

On May 26, 2011 OWCP determined that a conflict in medical opinion existed between Dr. Ha'Eri and Dr. Raskin regarding appellant's work restrictions. To resolve this conflict it referred her to Dr. George Balfour, a Board-certified orthopedic surgeon, for an impartial medical examination (IME). The examination occurred on August 2, 2011.

On June 13, 2011 the employing establishment offered appellant a temporary modified assignment performing window service. In this position, appellant performed money transactions involving stamps and she performed other limited retail duties using a touch screen. Occasionally she was required to perform post office box rentals, nonstamp transactions, or assist with customer claims. Appellant accepted mail which customers placed on the countertop, but she was provided assistance to lift any item beyond her lifting restrictions. The position had restrictions of no work above shoulder level, no heavy lifting, pushing, or pulling, and no repetitive forceful gripping. The job included simple grasping, lifting, standing, and fine manipulation. On June 22, 2011 appellant accepted the job offer under protest, but worked only a part of one day before she stopped. Thereafter, she submitted various claims for wage-loss compensation (Form CA-7) for periods beginning June 22, 2011. On July 30, 2011 appellant returned to work in a limited-duty capacity, but she again stopped work approximately one week later.

In his August 2, 2011 IME report, Dr. Balfour reviewed the offered position description and opined that appellant could work full duty with restrictions of reaching overhead for no more than one hour a day. He opined that appellant's physical findings did not warrant any limitation on lifting, carrying, or reaching at chest level. Dr. Balfour indicated that the weight limitations proposed by both Dr. Raskin and Dr. Ha'Eri were identical and correct; *i.e.*, no lifting, pushing, pulling more than 25 pounds, and no repetitive gripping or grasping more than 25 pounds of force. He concluded that appellant was working at a front desk and was capable of doing so within the identified work restrictions.

Appellant filed additional claims for compensation (Form CA-7) for the period August 13 to 19, August 27 to September 5, and September 7 to October 5, 2011.

⁶ Dr. Raskin had performed the left and right shoulder surgical procedures in October 2003 and January 2004.

In a November 23, 2011 decision, OWCP denied appellant's claim for wage-loss compensation for the claimed periods beginning June 22, 2011. Based on Dr. Balfour's findings, it determined that appellant could perform the limited-duty window clerk assignment which had been offered on June 13, 2011. On December 8, 2011 appellant timely requested a telephone hearing with a representative of the Branch of Hearings and Review. On June 11, 2012 the hearing representative affirmed OWCP's November 23, 2011 decision.⁷

In a January 4, 2013 decision, OWCP denied wage-loss compensation for the periods August 13 to 19, 2011, August 27 to September 5, 2011, and September 7 to October 5, 2011.⁸

Appellant subsequently filed claims for wage-loss compensation (Form CA-7) for the period April 21, 2012 through January 28, 2013, which OWCP denied by decision dated August 29, 2013.⁹

Appellant submitted an August 7, 2012 work status report from Dr. Raskin in which he indicated that there was "no change" in her ability to work.

On January 25, 2013 appellant was sent a notice to report to duty performing the activities set forth in the June 13, 2011 modified-duty assignment. A copy of the offer of modified-duty assignment was provided to her for review. Appellant returned to work on January 29, 2013, but the employing establishment advised her that, before she could resume her work as a limited-duty window clerk, she needed to undergo 40 hours of training. The employing establishment tentatively scheduled window training for February 11 through 15, 2013. OWCP paid appellant wage-loss compensation for the period January 29 through February 10, 2013 (69.15 hours), and 8 hours of compensation for February 16, 2013. Appellant reported for work on February 25, 2013, but left later that same day, alleging that she had been required to work beyond her restrictions and that she had pain.

Appellant submitted claims for compensation (Form CA-7) covering the period February 25 through May 31, 2013. OWCP instructed her to submit medical documentation to support the refusal of work.

Appellant submitted medical notes from Dr. Raskin, including a March 12, 2013 report, in which he indicated that she was totally disabled from work as of February 25, 2013 due to increased pain. Dr. Raskin had released her to return to work with restrictions, but noted that her increased pain was due to working beyond her restrictions for two days. Appellant also submitted a May 24, 2013 report from Dr. Sadhana Kamath Palm, a physician Board-certified in

⁷ Following requests for reconsideration, OWCP subsequently denied modification of the November 23, 2011 decision by decisions dated August 24, 2012, February 14 and May 9, 2013.

⁸ After a request for a hearing on September 11, 2013, an OWCP hearing representative affirmed OWCP's January 4, 2013 decision. Additionally, following a request for reconsideration, OWCP denied modification of the January 4, 2013 hearing representative's decision on October 28, 2014.

⁹ Following a request for a hearing on June 4, 2014, a hearing representative affirmed OWCP's August 29, 2013 decision.

internal medicine, which noted that she could not perform the duties of clerk or carrier for the period May 17 through June 30, 2013.

By decision dated July 2, 2013, OWCP denied the claim for temporary total disability for the period February 25 to May 31, 2013. It found that the evidence of record did not establish that appellant was unable to perform the duties of the light-duty assignment performing window service. OWCP found the new reports of Drs. Raskin and Kamath were insufficiently rationalized to establish that appellant was unable to perform the light-duty assignment and insufficient to overcome the report of Dr. Balfour, the impartial medical specialist, who had determined that she was capable of performing the offered, light-duty assignment.

Appellant continued to file claims for compensation (Form CA-7) from June 20, 2013 through January 14, 2015.

Appellant's new treating physician, Dr. Mark Greenspan, a Board-certified orthopedic surgeon, requested, on July 14, 2014, authorization for a repeat arthroscopic evaluation of the left shoulder. OWCP referred appellant for a second opinion examination with Dr. Kevin Hanley, a Board-certified orthopedic surgeon, to determine whether the surgery should be approved. In a report dated August 12, 2014, Dr. Hanley found that subacromial decompression arthroscopically, and inspection of the rotator cuff for any signs of tearing would be an appropriate course of treatment. He found this treatment a continuation of her original problem for which she was treated surgically in January 2003. Dr. Hanley responded that appellant's complaints did not represent an aggravation, but rather a progressive condition. Continued passage of time had caused the subacromial space to diminish secondary to build-up of scar tissue as well as migration of the humeral head upward secondary to increasing weakness of the rotator cuff musculature. Dr. Hanley found this to be a material change that had altered the course of the underlying disease and had brought appellant to the point where she was a candidate for surgical intervention.

Appellant timely requested an oral hearing from the July 2, 2013 decision, which was held on January 14, 2015.

Appellant also submitted reports from Dr. Robert Imani, a Board-certified psychiatrist, who noted treating appellant for stress, major depression, and anxiety. Finally, she submitted a return to work note of Dr. Gregory D. Jenkins, a family physician, releasing her to return to work on March 1, 2013.

In a March 24, 2015 decision, an OWCP hearing representative affirmed the denial of appellant's claim for total disability for the period February 25 to May 31, 2013. She found that the 2011 report from Dr. Balfour, the impartial medical specialist, continued to represent the special weight of the medical evidence as no additional evidence was provided which was sufficient to overcome the special weight as to the issue of work restrictions during the claimed period of compensation from February 25 through May 31, 2013.

On August 20, 2015 appellant filed a timely request for reconsideration from the March 24, 2015 decision. She argued that she was entitled to ongoing compensation commencing June 22, 2011 and that she had presented documentation supporting wage loss from

February 25 through May 31, 2013 and into the present time. Appellant argued that surgery was requested on February 28, 2013, but had not been performed until nearly two years later (January 15, 2015) due to delays by OWCP. She noted that Dr. Hanley, the second opinion examiner, had approved her surgery in his August 12, 2014 report, and had described her condition as progressive. Appellant argued that this demonstrated a material change in her condition. She further asserted that the report of Dr. Balfour was 19 months old when she was to return to work and that his report should not be used as it was stale medical evidence. Appellant indicated that the medical evidence supported that she was taken off work beginning February 25, 2013 and remained temporarily totally disabled. She provided new medical evidence regarding her January 15, 2015 surgery. Appellant contended that she suffered wage loss from June 22, 2011 to February 25, 2013, and from February 26, 2013 into the present time and should be compensated for such periods.¹⁰

By decision dated September 11, 2015, OWCP denied appellant's request for reconsideration of the merits. It noted that she returned to work for a very brief period of time and later stopped working, and therefore the burden of proof shifted to her to prove a recurrence of disability by the submission of evidence that there had been a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements. OWCP addressed each of appellant's assertions and found that the information and arguments she provided were duplicative, irrelevant, or immaterial and thus had no bearing on the issue or were inconsequential in regards to the issue.

On March 23, 2016 appellant again requested reconsideration. In her March 20, 2016 letter, she provided a background of her claim. Appellant indicated that, between 2009 and 2011, she had been on the periodic rolls for nearly two years. She argued that her compensation was cut off immediately and permanently in June 2011, without due process. Appellant indicated that, although she returned to odd-lot, makeshift temporary work for a few days, OWCP never afforded her notification and due process as her case continued to be denied based on a claimed "suitable" job offer. She also argued that it was unclear which job offer Dr. Balfour, the impartial medical specialist, reviewed as she was presented with two temporary job offers, indicating that she had shown up and worked one of the temporary jobs and that the other temporary job was accepted under protest. Appellant indicated that she was sent home and was not instructed to return to a temporary training position until January 2013, a time at which OWCP had accepted that her medical conditions had progressed and she was in need of surgery. She further expressed her disagreement with the claims examiner's findings that her need for surgery, the January 7, 2013 magnetic resonance imaging (MRI) scan, and medical evidence were not relevant, even though they were in the exact time frame. Appellant also expressed her disagreement with the claims examiner's other findings that her arguments, such as shifting the burden of proof, were irrelevant to the issue at hand or had previously been considered.

Since the issuance of the September 11, 2015 nonmerit decision, OWCP received copies of physical therapy notes, authorization requests, hearing and review requests, a September 18, 2015 statement, medical evidence dated August 23, 1999, October 28 and November 22 and 26,

¹⁰ By decision dated September 3, 2015, OWCP denied appellant's claim for disability compensation for 6.84 hours on June 20, 2013 due to lack of available work and for total disability for the period August 12, 2014 through January 14, 2015.

2013, January 15, September 2, 12, 25 and 28, October 25, and November 23, 2015, January 25, and March 30 and 31, 2016, CA-7, CA-2 forms and SF-50, a March 2, 2016 letter from the Office of Personnel Management, a March 11, 2016 letter from appellant, letters pertaining to hearing scheduling, a notice of representation, a copy request, and OWCP decisions dated April 4 and 6, 2016 pertaining to a schedule award claim.

By decision dated May 6, 2016, OWCP denied appellant's request for reconsideration of the merits. It noted that the only relevant issue for consideration was disability compensation for the period February 25 to May 31, 2013. OWCP addressed each of appellant's assertions and found that the information and arguments she provided were duplicative, irrelevant, or immaterial and thus, had no bearing on the issue or were inconsequential in regards to the issue. It also found that none of the medical evidence received since the September 11, 2015 decision was contemporaneous to the period of disability in question, February 25 to May 31, 2013.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.¹¹

A claimant seeking reconsideration of a final decision must present arguments or provide evidence which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹² If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.¹³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim. The only issue before the Board is whether appellant has established her claimed disability for the finite period February 25 to May 31, 2013. Appellant failed to submit any relevant and pertinent new evidence in support of her reconsideration request. Establishing

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹³ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

¹⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁵ 20 C.F.R. § 10.607(a).

her claim for disability is a medical issue. The medical evidence received since OWCP's September 11, 2015 decision is not contemporaneous to the period of disability in question and, while new, is not relevant and pertinent new evidence which would warrant further merit consideration. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

Furthermore, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP. In her March 20, 2016 letter requesting reconsideration, she expressed her disagreement with the previous claims examiner's handling of her arguments. Appellant presented no new arguments, rather she reiterated arguments previously addressed. It is well established that evidence which repeats or duplicates that already of record and considered by OWCP does not constitute a basis for reopening a claim for further merit review.¹⁷ Appellant argued that she was removed from the periodic rolls in June 2011, without due process. The record reflects that appellant was on the periodic rolls from July 5 to November 27, 2009, after which time she returned to work in a part-time light-duty capacity. A pretermination notice (due process) is not required when a claimant returns to work.¹⁸ Further, this argument is not relevant to the issue of whether she was medically able to perform light-duty work during the specific period of February 25 through May 31, 2013.¹⁹ Appellant incorrectly contends that compensation in her case continues to be denied based on a claimed "suitable" job offer. It is noted that compensation from February 25 through May 31, 2013 was denied as she did not work light duty which was found to have been within her medical restrictions. While appellant argued it was unclear which job offer Dr. Balfour reviewed, both job offers were within the permanent restrictions he had assigned in his independent medical evaluation.

Appellant's remaining arguments regarding burden of proof and her need for surgery are duplicative, irrelevant, or immaterial and thus had no bearing on the issue, or are inconsequential regarding whether she was medically able to perform light-duty work during the period February 25 through May 31, 2013.²⁰

Because appellant failed to meet any of the standards enumerated under section 8128(a) of FECA, she was not entitled to further merit review of her claim.²¹

¹⁶ See *M.D.*, Docket No. 16-0745 (issued February 8, 2017); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁷ See *Edward W. Malaniak*, 51 ECAB 279 (2000).

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(c) (March 1997). See also *Winton A. Miller*, 52 ECAB 405 (2001) and *Donald Leroy Ballard*, 43 ECAB 876 (1992).

¹⁹ See *supra* note 9.

²⁰ See *supra* note 9.

²¹ See *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

On appeal appellant submitted a copy of her prehearing petition which was previously of record and had been considered in the March 24, 2015 decision. She argues that a thorough review of her file would show a preponderance of evidence establishing her claim. As noted, the Board does not have jurisdiction over the merits of this claim. Appellant failed to provide any evidence to demonstrate that OWCP erroneously denied her request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 28, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board